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No. 88-1476

In The

Supreme Court of the United States

October Term, 1988

C. T. CARDEN, LEONARD L. LIMES
AND MAGEE DRILLING COMPANY,

Petitioners,

versus

ARKOMA ASSOCIATES,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the holding of the Fifth Circuit Court of Appeals in *Arkoma Associates v. C. T. Carden, et al.*, not reported, (5th Cir. 1988), rehearing denied, January 5, 1989; is in conflict with this Court's decisions in *Great Southern Fire Proof Hotel v. Jones*, 177 U. S. 449, 20 S. Ct. 690, 44 L. Ed. 842 (S. Ct. 1900) and in *Navarro Savings Association v. Lee, et al.*, 446 U. S. 458, 100 S. Ct. 1779, 64 L. Ed. 2d 425 (S. Ct. 1980).

2. Whether the common citizenship of a limited partner of a plaintiff Arizona limited partnership and that of the defendants is fatal to the presence of diversity jurisdiction.

STATEMENT OF PARTIES

Pursuant to Rule 21.1 (b) and Rule 28.1 of the *Rules* of this Court, counsel for petitioners certify that the following named persons are parties to this proceeding:

(1) C. T. Carden;
(2) Leonard L. Limes;
(3) Magee Drilling Company;
(4) Arkoma Associates;
(5) David A. Hepburn;
(6) Eldon Qualls;
(7) Richard K. Ledbetter;
(8) Dudley B. Merkel;
(9) Henry Stram;
(10) Lloyd Canton;
(11) Marie Weaver;
(12) Richard Aylward;
(13) Robert Aylward;
(14) Larry Berberich;
(15) Abhay Bisarya;
(16) Joseph Bowman;
(17) Harvie Chaddock;
(18) Dr. James Di Renna;
(19) Robert Eltonhead;
(20) Dennis Swan;
(21) Dick Gibson;
(22) Dr. John Hagan;
(23) Leo Hallack;
(24) Robert E. Harmon;
(25) Richard L. Harmon;
(26) Earl Hoatson;
(27) Andrew Kaufman;
(28) Dr. Allen Parelman;
(29) Bill Kryger;
(30) L V A Partnership;
(31) Dr. Richard Lynch;
(32) Mc Fadin Partnership;
(33) John Mc Keever;
(34) Percy Mc Kinley;
(35) Nat N. Nast;
(36) Dr. John Pawsat;
(37) Henry Rankin;
(38) David Russell;
(39) Robert Samson;
(40) Dr. Daniel Scharf;
(41) Robert Schneider;
(42) Larry Shultz;
(43) Keith Shultz;
(44) Elton Shannon;
(45) Ernest Staub;
(46) Frances Swan;
(47) John Sullivan;
(48) Jon Symon;
(49) David Wharton;
(50) Dale Williams;
(51) Dr. Robert Doering; and
(52) Jim Veselich.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
Statement of Parties	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Summary of Argument	4
Argument	5
I. *Arkoma* conflicts with the decision of the Supreme Court in *Great Southern Fire Proof Hotel v. Jones*, 177 U. S. 449 and *Navarro Savings Ass'n v. Lee*, 466 U. S. 458	5
II. Citizenship of limited partners must be considered in determining diversity jurisdiction of an action in which a limited partnership is a party	9
III. The method of determining the citizenship of a limited partnership advanced by the Fifth Circuit Court of Appeals is unworkable	12
Conclusion	15

TABLE OF AUTHORITIES

Page

CASES:

Chapman v. Barney, 129 U. S. 677 (S. Ct. 1889).....5, 15

Colonial Realty Corporation v. Bache & Co., 358 F. 2d 178 (2d Cir. 1966) 6, 11

Elston Investment Ltd. v. David Altman Leasing Corporation, 731 F. 2d 436 (7th Cir. 1984).....9, 10

Great Southern Fire Proof Hotel v. Jones, 177 U. S. 449 (S. Ct. 1900).....i, iii, 4, 5, 9, 10, 14, 15

Lee, et al. v. Navarro Savings Association, 597 F. 2d 421 (5th Cir. 1979)..... 5, 6, 11, 15

Mesa Operating Limited Partnership v. Louisiana Intrastate Gas Corporation, 797 F. 2d 238 (5th Cir. 1986).....3, 6, 11, 12, 15

Navarro Savings Association v. Lee, et al., 466 U. S. 458 (S. Ct. 1980)..... i, iii, 4, 5, 6, 7, 8, 10, 11, 14, 15

New York State Teachers Retirement System v. Kalkus, 764 F. 2d 1015 (4th Cir. 1985).....9, 10

Stouffer Corporation v. Breckenridge, 859 F. 2d 75 (8th Cir. 1988).....9, 10

Trent Realty Associates v. First Federal Savings & Loan Association of Philadelphia, 657 F. 2d 29 (3rd Cir. 1981) 9, 10

United Steelworkers of America v R. H. Bouligny, Inc., 382 U. S. 145 (S. Ct. 1965)..... 7, 10, 14, 15

UNITED STATES CONSTITUTION:

United States Constitution, Article III, Section 2 2

TABLE OF AUTHORITIES – Continued

Page

STATUTES:

28 U. S. C. 1254 (1)..... 2

28 U. S. C. 1292 (b)..... 3

28 U. S. C. 1332 (a)..... 2

Federal Rules of Civil Procedure 17 (a) 8

Arizona Revised Statutes 29-301 10

Arizona Revised Statutes 29-326 (Repealed) 11

OTHER AUTHORITY:

Uniform Limited Partnership Act, Section 26..... 11

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To The United States Court Of Appeals
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BRIEF OF PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on December 7, 1988, is not reported, but appears at page A-1, et seq. of petitioners' application for certiorari.

The findings of fact and conclusions of law of the United States District Court for the Eastern District of

Louisiana were entered on July 29, 1987, and appear at page C-3, et seq. of petitioners' application for certiorari.

JURISDICTION

This Court granted petitioners' Petition for Writ of Certiorari on May 1, 1989, to review the judgment of the United States Court of Appeals for the Fifth Circuit. Jurisdiction of the Supreme Court is invoked pursuant to *28 U. S. C. 1254 (1).*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The questions presented by this Petition involve the following constitutional and statutory provisions of the United States:

United States Constitution Article III, Section 2 states:

> The judicial power shall extend to all Cases, in Law and Equity, . . . between citizens of different States . . .

28 U. S. C. 1332 (a), states:

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000.00, exclusive of costs, and is between –
>
> (1) citizens of different States; . . .

STATEMENT OF THE CASE

On May 23, 1985, Arkoma Associates (hereafter sometimes "Arkoma") filed this action against C. T. Carden (hereafter sometimes "Carden") and Leonard L. Limes (hereafter sometimes "Limes") as the guarantors of the performance of Magee Drilling Company (hereafter sometimes "Magee" or collectively with Carden and Limes, "Petitioners") as the lessee of an equipment lease (Exhibit P-3 of District Court Record) entered into with Arkoma as lessor. During the course of the proceedings in the District Court, Magee intervened as a party defendant and a counterclaimant.

Carden and Limes filed a motion to dismiss in the District Court (page 58 of the Joint Appendix) for lack of diversity jurisdiction based on the common citizenship of Carden, Limes, and a limited partner of Arkoma. Such common citizenship is the subject of the stipulation entered into among Carden, Limes, and Arkoma (page B-1, et seq. of Petitioners' Petition for Writ of Certiorari, page 56 of the Joint Appendix). The District Court denied the motion to dismiss, but certified the jurisdictional question for interlocutory appeal pursuant to *28 U. S. C. 1292 (b)*. The Court of Appeal denied the interlocutory appeal based on its decision in *Mesa Operating Limited Partnership v. Louisiana Intrastate Gas Corporation*, 797 F. 2d 238 (5th Cir. 1986). Thereafter, a petition for certiorari was filed in this Court and denied. The case was tried on the merits, and judgment was rendered in favor of Arkoma. Petitioners appealed. The Court of Appeals affirmed the District Court, found diversity jurisdiction present,

denied rehearing, and Petitioners again sought certiorari which was granted by this Court on May 1, 1989.

SUMMARY OF ARGUMENT

This Court, in *Great Southern Fire Proof Hotel v. Jones*, 177 U. S. 449, 20 S. Ct. 690, 44 L. Ed. 842 (S. Ct. 1900), held that the citizenship of all partners of a limited partnership must be considered in determining diversity. This holding was approved in *Navarro Savings Association v. Lee*, 446 U. S. 458, 100 S. Ct. 1779, 64 L. Ed. 2d 425 (S. Ct. 1980) and should not now be abandoned.

An Arizona limited partnership is an unincorporated association. As such, the citizenship of all partners, both general and limited, determines the presence or absence of diversity jurisdiction.

Citizenship between plaintiff and defendants in this case is not diverse because of the presence of common citizenship among a limited partner of plaintiff and Carden and Limes. As no other basis for federal jurisdiction exists, the federal courts are without jurisdiction in the premises.

The adoption of a rule which determines the citizenship of a limited partnership on the basis of that of the "general partners" alone is entirely unworkable because of the variety of considerations which must attend a determination of the identity of such individuals.

ARGUMENT

I. THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS CONFLICTS WITH THE DECISIONS OF THIS COURT IN *GREAT SOUTHERN FIRE PROOF HOTEL V. JONES*, 177 U. S. 449, 20 S. Ct. 690, 44 L. Ed. 842 (S. Ct. 1900) AND IN *NAVARRO SAVINGS ASSOCIATION V. LEE*, 446 U. S. 458, 100 S. Ct. 1779, 64 L. Ed. 2d 425 (S. Ct. 1980).

In *Great Southern Fire Proof Hotel v. Jones*, supra, suit was filed by a plaintiff limited partnership, but the citizenship of all partners was not alleged. This Court noted the deficiency on its own motion and held, citing *Chapman v. Barney*, 129 U. S. 677, 32 L. Ed. 800, 9 S. Ct. 426 (S. Ct. 1889), that because jurisdiction rested only upon diversity, the citizenships of all partners must be alleged and considered for diversity purposes. *Great Southern*, unless overruled in these proceedings, controls the present case.

The law has not changed since *Great Southern*; indeed, not since *Chapman*, supra, and the comparatively recent case of *Navarro*, supra, confirms, unequivocally, that this Court does not intend to abandon its prior holdings. To the contrary, *Navarro*, with greater clarity and specificity than before, sets forth the relevant considerations in diversity cases.

Why then did the Fifth Circuit decide the present case to the contrary? Counsel suggests two reasons: 1) The Fifth Circuit's decision in *Lee et al. v. Navarro Savings Association*, 597 F. 2d 421 (5th Cir. 1979) was in fact affirmed, and the Fifth Circuit mistakenly takes the affirmation as approval of its reasoning. That misconception

having taken root, the Fifth Circuit has not considered itself at liberty to again till the jurisdictional soil in either *Mesa*, supra, or the present case, unless otherwise directed by this Court; 2) The Fifth Circuit mistakenly believes that an express business trust and a limited partnership are indistinguishable insofar as their treatment for jurisdictional purposes is concerned.

Clear evidence of this Court's disapproval of the Fifth Circuit's reasoning is found by comparing the analogy made by the Fifth Circuit in *Lee*, supra, and *Mesa*, supra, to this Court's footnote 10 in *Navarro*. The Fifth Circuit sustained diversity jurisdiction in both by analogizing the business trust to a limited partnership relying on *Colonial Realty Corporation v. Bache & Company*, 358 F. 2d 178 (2d Cir. 1966) which held that in a diversity case involving a limited partnership the citizenship of the general partners alone need be considered. The *Mesa* court said that the reasoning by which the citizenship of the trustees alone need be considered was "equally appropriate here." It was not equally appropriate and this Court said so in footnote 10 of *Navarro*:

> The Court never has analogized express trusts to business entities for purposes of diversity jurisdiction. . . .

The Fifth Circuit in *Mesa* went on to characterize a limited partnership in these words:

> A limited partnership is also neither corporation nor association but a similar hybrid. . . .

A limited partnership is not a "similar hybrid" to an express business trust. It is not similar and it is not a

hybrid. In a limited partnership, no law makes the general partners the title owners of the assets of the partnership as the trustee is the title owner of the trust assets. In a limited partnership, no law grants tc the limited partners the right only to compel delivery of title to them by appropriate action, as the beneficiaries of a trust might do in proper circumstances. To the contrary, the limited partners own their portion of the assets of the partnership from the moment of the acquisition of such assets. As to being a "hybrid," the seminal question is simply this: is a limited partnership a juridical person or corporation which has the legislatively recognized citizenship of the state in which it is formed, or is it not? If not, it is a group of people who own something, no more, no less. On two occasions this dichotomy was recognized in *Navarro*. At 100 S. Ct. at page 1782, this Court held:

> "Although corporations suing in diversity long have been "deemed" citizens, see n. 7, supra, unincorporated associations remain mere collections of individuals. When the 'persons composing such association' sue in their collective name, they are the parties whose citizenship determines the diversity jurisdiction of a federal court. *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 456, 20 S. Ct. 690, 693, 44 L. 842 (limited partnership association) . . .

(Parenthetical comment, the Court's). Then, in footnote 9 the Court cited *United Steelworkers of America v R. H. Bouligny, Inc.*, 382 U. S. 145, 86 S. Ct. 272, 15 L. Ed. 2d 217 (S. Ct. 1965) which held that the citizenships of all members of a labor union were relevant to the determination of diversity jurisdiction. Once the unincorporated character of the labor union was established, it followed inexorably, that the citizenship of all members must be

considered for diversity purposes. The *Navarro* Court went on to note that the presence of standing to sue in the name of an unincorporated association says nothing about diversity jurisdictional requirements, to-wit:

> There is a 'rough symmetry' between the 'real party in interest' standard of Rule 17 (a) and the rule that diversity jurisdiction depends upon the citizenship of real parties to the controversy. But the two rules serve different purposes and need not produce identical outcomes in all cases. . . . In appropriate circumstances, for example, a labor union may file suit in its own name as a real party in interest under Rule 17 (a). To establish diversity, however, the union must rely upon the citizenship of each of its members. *Steelworkers v. Bouligny, Inc.* . . .

The line between express business trusts and limited partnerships, like the line between incorporated and unincorporated associations, is, therefore, thick and black.

As to the "real party in interest test" of *Navarro*, it should be noted that no limited partnership has the foundation of *Federal Rules of Civil Procedure, Rule 17(a)* upon which to rest. The cited rule designates trustees of an express trust as real parties in interest. There is no such designation relative to partnerships or limited partnerships. What then is the basis of the Fifth Circuit's selection of general partners *only* as real parties in interest, to the exclusion of the limited partners:

Do the general partners own the assets of the partnership to the exclusion of the limited partners? They do not. To the contrary, the limited partners own 99% of the assets of Arkoma, the generals, 1%.

Is there a recognized division of title between general and limited partners? There is not. Title is vested in all of the partners from the moment of acquisition of partnership property.

Are the limited partners of Arkoma debarred from all involvement in the affairs of the partnership? They are not. They may veto the sale of partnership assets and control the use of the proceeds of such sales. (See Arkoma articles of partnership sections 6.2 and 6.3 [page 82 et seq. Joint Appendix]).

II. THE CITIZENSHIPS OF THE LIMITED PARTNERS OF AN ARIZONA LIMITED PARTNERSHIP ARE RELEVANT TO THE PRESENCE OR ABSENCE OF DIVERSITY JURISDICTION.

The Third Circuit in *Trent Realty Associates v. First Federal Savings and Loan Association of Philadelphia*, 657 F. 2d 29 (3rd Cir. 1981); the Fourth Circuit in *New York State Teachers Retirement System v. Kalkus*, 764 F. 2d 1015 (4th Cir. 1985); the Seventh Circuit in *Elston Investment, Ltd. v. David Altman Leasing Corporation*, 731 F. 2d 436 (7th Cir. 1984); and the Eighth Circuit in *Stouffer Corporation v. Breckenridge*, 859 F. 2d 75 (8th Cir. 1988) have held that the citizenship of both the general and limited partners must be considered in determining diversity jurisdiction. They have correctly reasoned thusly:

1) A limited partnership is an unincorporated association whose citizenship is controlled by that of its members. *Trent*, supra, citing *Great Southern Fire Proof Hotel Co.*

v. Jones; *Elston* and *Stouffer*, supra, citing *United Steelworkers v. R. H. Bouligny, Inc.*; *New York Teachers*, citing *Great Southern* and *United Steelworkers*;

2) This Court's decision in *Navarro*, did not change the foregoing rules, rather it specifically distinguished between an express trust as in *Navarro*, and a limited partnership. See quotation from *Navarro* herein at page 7;

3) This Court's decision in *Navarro* did not compel the application of a "real party in interest" test to limited partnerships as the basis for ignoring the citizenship of limited partners, *Trent*. Alternatively, even if a "real party in interest" test is applied, those parties are the members of the partnership, both general and limited, *Elston*.

Each court concluded that the presence of a non-diverse limited partner destroyed diversity citizenship. The Fifth Circuit has never responded to these considerations, beyond its attempt to equate limited partnerships with express business trusts for jurisdictional purposes, an equation in which the argument will never equal the result.

There are additional compelling factors which are peculiar to the present case:

1) Arkoma is an Arizona partnership. Its articles of partnership provide that they shall be governed by that State's law (page 92, Joint Appendix). The Arizona Limited Partnership Act, *Arizona Revised Statutes 29-301, et seq.* (effective July 24, 1982, the law in effect when this civil action was filed) does not provide that limited partnerships are juridical persons having an existence separate and apart from their members. Therefore, there is no

authority for treating Arkoma as a juridical person, in the sense that a corporation is so treated, and imputing Arizona citizenship to it.

2) *Section 26* of the *Uniform Limited Partnership Act*, enacted as former *Arizona Revised Statutes 29-326*, since repealed, provided:

> A contributor, unless he is a general partner, is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership.

This provision was relied upon in error by the Second Circuit in *Colonial Realty*, supra, which decision was in turn relied upon by the Fifth Circuit in *Lee*. The concept of standing to sue is thoroughly distinguishable from that of diversity jurisdiction as this Court pointed out in footnote 9 to its opinion in *Navarro*. (See page 7 herein.) Yet, Arkoma is denied even this illusion as the quoted *Section 26* was intentionally omitted from the Arizona act when it was revised in 1982.

3) The Arkoma limited partners do participate in the affairs of the partnership. As reflected by Arkoma's articles of partnership, paragraphs 6.2 and 6.3, the limited partners may veto the sale of the partnership assets and control the use of proceeds of such sales (page 82, et seq., Joint Appendix). Therefore, no delineation of control, such as that characterized by the Fifth Circuit in *Lee*, and *Mesa*, in the partnerships there under consideration, exists in the case of Arkoma. Nor is it likely to be found in most limited partnerships whose limited partners are unwilling to accept, with supine repose, the unbridled activities of the general partners.

III. THE METHOD OF DETERMINING THE CITIZENSHIP OF A LIMITED PARTNERSHIP ADVANCED BY THE FIFTH CIRCUIT COURT OF APPEALS IS UNWORKABLE.

Perhaps even litigants might universally agree that there is a benefit to be obtained in knowing, in advance of filing suit, when diversity jurisdiction exists and when it does not. In an ideal world, counsel would be able to determine whether the parties to their litigation are individuals, corporations, unincorporated associations, trusts, or successions and know, with reasonable certainty, if the cause at hand may be litigated in federal court on grounds of diversity of citizenship alone.

The Fifth Circuit proposes the following rule to which strict adherence will be required:

> . . . where it is possible to identify clearly a class of members as the real party to a controversy, the citizenship of that class alone is relevant for diversity purposes.

(*Mesa*, at page 240)

What qualities will that "class of members" possess in common:

1) Will they own more than 1%, 50%, or 90% of the partnership assets?

2) Will they enjoy administrative control over the affairs of the partnership to the complete exclusion of the limited partners, substantial exclusion, or partial exclusion?

3) Will they be allocated all of the taxpayer advantages of ownership, depreciation, or depletion, some of them, or none of them?

4) Will they be deprived of any involvement in partnership affairs, or will the price of such involvement be a loss of limited liability?

Having identified those common qualities, may counsel rely, with impunity, upon the articles of partnership to determine the presence of the common qualities above enumerated, or must he concern himself with the real operation of the partnership; and if the latter, for what period of time? Would not the period of time during which the cause of action arose be critical? Or because he is looking for the true nature of the entity under consideration to determine these common qualities, must he concern himself with how the partnership has been operated since its inception? Operation on the date of filing suit, is yet another possibility, for that is the date on which jurisdiction is determined. Can he determine, on that single day, the extent of limited partner participation in the ownership, management, administration, or benefits of the partnership?

In the Arkoma partnership, the general partners own one per cent of the assets, the limited partners the rest, and the administration of the partnership is certainly not uninhibited. Of course, these facts may be gleaned from the partnership articles, but an inquiry into the actual operation of the partnership may reveal an entirely different array of restrictions.

Even if counsel can glean from these circumstances a group of common qualities which allow him to "identify clearly" a class of members who possess these qualities; and even if he can satisfy himself, from a careful analysis of the partnership documents and activities, that he has clearly defined general partners, it will nevertheless remain a mystery, how, even under these circumstances, he can exclude from the realm of real parties in interest, persons who actually own all or a portion of the partnership assets. The lowliest urchin in the street, if asked, would affirm without equivocation, that a fee owner of a portion of the partnership assets is a real party in interest when those assets are at risk. The Fifth Circuit should not have held otherwise, particular in the face of *Great Southern*.

The only course that works; the only course that has a foundation in law and equity; the only course that is predictable; is the one now charted by this Court. Insofar as corporations and unincorporated associations are concerned, counsel may determine citizenship prior to filing litigation, in most cases, by a letter to the state's secretary, the response to which identifies the incorporated or unincorporated nature of the entity with which he is dealing. That is the rule established by *Great Southern* and reaffirmed in *Navarro*. That is the rule enunciated in *United Steelworkers* in which this Court subjoined the opinion that if the rule need be changed, it is within the province of the legislature only to change it. There is no reason to depart from such sound reasoning.

CONCLUSION

The decisions of the Fifth Circuit in *Lee*, supra; *Mesa*, supra; and the present case; conflict with the jurisprudence of this Court in *Chapman*; *Great Southern*; *United Steelworkers*; and *Navarro*.

The test sought to be adopted by the Fifth Circuit is unworkable.

The citizenship of all non-juridical unincorporated associations is that of all of its members. Such citizenship in this case is not diverse from that of opposing parties.

Federal courts have no jurisdiction to hear this case.

Respectfully submitted,

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APPENDIX

Calculation of the Weighted Average Dumping Margin

The weighted average dumping margin is calculated by compiling the results of all sales examined, both those made at fair value and those made at LTFV. Only if the weighted average margin is more than *de minimis* will Commerce subject a company, or country, to an anti-dumping duty order. Thus, through the calculation of the weighted average dumping margin, Commerce considers all of the evidence in front of it in determining whether the class or kind of merchandise is being, or is likely to be, sold at LTFV.

In this context, it is useful to recall how the Department actually calculates margins, to show how the Department ultimately decides whether a class or kind of merchandise is being dumped, or is likely to be dumped.

The foreign market value is compared to the U.S. price of the sales being examined that the foreign producers/exporters made to U.S. purchasers during the six-month period of investigation. In order to make comparisons, Commerce converts the foreign market value into U.S. dollars. After conversions are made, the converted foreign market values are compared to the U.S. prices.

For any transaction for which the U.S. price is greater than the foreign market value, the dumping margin is zero. For any transaction for which the foreign market value is greater than the U.S. price, the dumping margin is the difference between the foreign market value and the U.S. price divided by the U.S. price. The following table illustrates the practice:

Transaction Number	U.S. Price	Foreign Market Value	Margin of Dumping
1.	1.50	2.20	46.7%
2.	2.20	2.20	0.0
3.	2.40	2.20	0.0
4.	2.00	2.20	10.0%

After these transaction-by-transaction dumping margins have been calculated, the Department calculates a weighted average dumping margin for each of the foreign producers/exporters, as follows:

Transaction Number	(a) Margin of Dumping	(b) Total Value of Transaction	(a) x (b) / 100
1.	46.7%	$ 900	420.30
2.	0	$1000	0
3.	0	$ 200	0
4.	10.0%	$1200	120.00
		$3300	$540.30

Weighted average Margin of Dumping = $\frac{540.30}{3300.00}$ X (100) = 16.4%

If the weighted average dumping margin is 0.5 percent or greater for any company, then the Department makes an affirmative determination of less than fair value sales. If the weighted average margin for any company is less than 0.5 percent, the Department considers this to be *de minimis*, and will exclude those companies with *de minimis* margins upon receipt of timely requests for exclusion.